

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 2nd February, 2012

+ **W.P.(C) 8496/2008**

% **SACHIN J. JOSHI & ANR.**

....Petitioners

Through: Mr. Sanjay Jain, Sr. Adv., Ms. Pinky Anand, Sr. Adv. with Mr. Trideep Pais, Mr. Lokesh Bhola & Mr. Shohit Chaudhry, Advs.

Versus

LT. GOVERNOR & ANR.

..... Respondents

Through: Mr. Ajay Verma, Adv. for DDA.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the order dated 10th November, 2008 of the respondent no.1 acting as the Chairman of the respondent no.2 DDA, refusing the request of the petitioners for amalgamation of hotel plots No.1&2 in Wazirpur District Centre, New Delhi and seeks mandamus for such amalgamation; compensation is also claimed for withholding the permission for amalgamation. Notice of the petition was issued and pleadings have been completed. The counsels have been heard.

2. The respondent no.2 DDA had in the year 1994 invited bids for grant of perpetual lease right in respect of a hotel plot measuring 18000 sq. mtr . and with a proposed built-up area of 30000 sq. mtr. at Wazirpur, Delhi. The bid of M.S. Shoes East was accepted; however, it defaulted in payment and cancellation was effected; litigation ensued and during the pendency thereof the respondent no.2 DDA was permitted to re-auction the plot. However this time around the respondent no.2 DDA bifurcated the plot auctioned in the year 1994 as one into two plots no.1&2 aforesaid and vide auction notice dated 4th May, 2006 invited bids therefor. The petitioner no.2 M/s Asrani Inns & Resorts Pvt. Ltd. of which the petitioner no.1 is one of the shareholders bid for both the plots and its bid being the highest was accepted and conveyance deeds dated 3rd November, 2006 with respect thereto executed in favour of the petitioner no.2 Company and possession handed over, subject of course to the outcome of the legal proceedings initiated by M.S. Shoes East. The petitioner no.2 Company was also impleaded as party in the said proceedings and was vide order dated 17th May, 2007 therein allowed to raise construction on the said plot.

3. The petitioners however, immediately after being delivered possession of the two plots and before commencing construction thereon, vide their letter dated 14th December, 2006 requested the respondent no.2 DDA for amalgamation of the two plots. Upon not receiving any response from the respondent no.2 DDA to the request for amalgamation, W.P.(C) No. 4251/2007 was filed in this Court. This Court vide order dated 29th May, 2007 therein directed the respondent no.2 DDA to consider the request for amalgamation and communicate its decision within fifteen days.

4. The respondent no.1 as Chairman of the DDA vide order dated 30th July, 2007 rejected the said request for amalgamation on the ground of the said request being in contravention to the condition mentioned in the auction document at Clause 3.10 (vii). It was further observed that since a decision had been taken to auction the erstwhile consolidated plot as two smaller size plots, the occasion to allow post auction amalgamation in violation of the auction condition did not arise.

5. The petitioners filed W.P.(C) No. 8101/2007 impugning the said order of rejection. During the pendency of the said writ petition the

petitioners were permitted to submit plans for construction treating the plots to have been permitted to be amalgamated. The said writ petition was however dismissed vide judgment dated 8th April, 2008. It was *inter alia* held that it being a term of the auction and which term stood incorporated in the conveyance deed executed in favour of the petitioner no.2 Company that amalgamation would not be allowed, no mandamus for amalgamation could be issued.

6. Intra-Court Appeal being LPA 210/2008 was preferred by the petitioners. Vide interim order in the said appeal, finding that the plot was earlier sought to be sold as a single/composite one and in view of the then impending Commonwealth Games-2010, subject to the petitioners depositing ₹4 crores with the respondent no.2 DDA, the petitioners were permitted to construct till plinth level on the two plots on the basis of amalgamated plot. It was however made clear that in the event of failure of the appeal the petitioners will not claim any equity on account of such construction and the construction so raised shall be dismantled forthwith. LPA 210/2008 (supra) was ultimately disposed of vide judgment dated 20th October, 2008. The Division Bench held/observed:-

- A. that the records showed that the plot was originally envisaged to be used as a single plot for the purpose of construction of a five star hotel; however when the plot was sought to be sold as a single plot it did not fetch an adequate price; it was then decided to split up the single plot into two plots. It was not therefore as if the plots were always intended to be sold as two separate plots;
- B. that though Clause 3.10(vii) of the terms & conditions of auction prohibited deviation in any manner from the layout plan, alteration of the size of the plot by subdivision, amalgamation or otherwise but the conveyance deeds of freehold rights in the plots executed in pursuance thereto did not contain any prohibition against amalgamation; it only prohibited alteration/addition “without written permission of the respondent no.2 DDA who may refuse or grant the same subject to such terms & conditions as may be deemed proper”. It was thus held

that Clause 3.10(vii) was not a fetter on the power of the respondent no.2 DDA to exercise its discretion;

- C. that respondent no.2 DDA had vide its Resolution dated 7th January, 1991 provided guidance to the exercise of the power of amalgamation. However no arguments were addressed before the Learned Single Judge with respect to the Resolution dated 7th January, 1991.
- D. that the counsel for the respondent no.2 DDA had not seriously pursued the argument that hotel plots are not commercial plots and therefore would not be governed by the Resolution dated 7th January, 1991;
- E. that the opinion of the Lt. Governor that Clause 3.10(vii) of the auction terms constituted a prohibition against amalgamation was based on an incorrect interpretation and owing whereto the respondent no.1 as Chairman of the DDA had not considered whether the discretion

vested in the respondent no.2 DDA to permit amalgamation was to be exercised or not.

The matter was therefore remanded to the respondent no.1 as Chairman of the DDA for fresh decision on the application of the petitioners for amalgamation, after considering the various factors which had emerged during the hearing before the Division Bench. Till the said decision, *status quo* was directed to be maintained.

7. It is pursuant to the aforesaid remand by the Division Bench in the earlier round of litigation that the respondent no.1 has vide order dated 10th November, 2008 again rejected the request for amalgamation for the following reasons:-

- “(1) The auction condition as mentioned at point No. (vii) (on page 10) of the brochure for the auction of the hotel plots states that successful bidder shall not deviate in any manner from the layout plan or alter the size of the plot by sub-division, amalgamation or otherwise. Changing of auction conditions, post-auction would vitiate the entire procedure as the amalgamation will totally change the type of hotel that can be constructed on the auctioned plots.
- (2) By stipulating in the auction conditions that amalgamation shall not be permitted, DDA, in fact,

prevented many of the leading International Hoteliers from bidding for the plots. It would be seen that by allowing amalgamation of plots post auction, DDA has favoured the auction purchaser while keeping away the renowned international Hoteliers from participating in the auction procedure.

- (3) Commercial plots and hotel plots stand on different footings, have different usages, have different architectural controls and are distinct from one another. While amalgamation is permitted in one category it is not permitted in the other. DDA in its history has not allowed amalgamation of hotel plots and by doing so would be setting a bad precedent.

Hence your request for amalgamation of the plots post-auction is hereby rejected.”

8. Impugning the aforesaid order the present writ petition was filed and the interim order of *status quo* was continued by way of interim order in this petition also.

9. Before considering the respective contentions, it is apposite to notice the Resolution dated 7th January, 1991 (*supra*) regarding grant of permission for amalgamation of “commercial plots”. The same records that, some of the allottees in whose favour leases had been executed by the respondent no.2 DDA had been representing for grant of permission for amalgamation on the plea that the amalgamation did not affect the Architectural Control

provisions; that the matter was examined by the screening committee of the respondent no.2 DDA which had proposed that all requests for amalgamation will be referred to Architectural Control and the Building Department who will work out details relevant to provision of building regulation and determine the remunerative area available to the party and will submit their observation/recommendation to the Land Department which will ultimately place the same before the Chairman, DDA for approval. It further proposed that the plots to be amalgamated should both have been leased in the name of the same party and no bifurcation of the amalgamated plot shall be permitted at any later stage. The rates for grant of permission were also proposed as 10% of the premium of amalgamated plot if the application is made within 10 years from the date of purchase, 20% of the premium of amalgamated plot for applications made between 10 & 20 years from the date of purchase and of 30% of the premium of amalgamated plot qua applications made after 20 years from the date of purchase. The said proposal was considered vide Resolution aforesaid of the respondent no.2 DDA and it was decided that a flat rate of 10% of the market value prevalent at the time of application be recovered irrespective of the

period of lease. It was also resolved that no reference to Building Cell or any other Section of the Planning Wing was necessary. The approval of the Central Government for the modification of the lease was also sought to be obtained.

10. It is the contention of the petitioner no.2 Company in this writ petition, that the rejection of its request is *inter alia* on the same grounds which had not found favour in the judgment of the Division Bench in the earlier round of litigation and thus does not constitute valid reason for rejection of the request; that as per the Resolution dated 7th January, 1991/Policy of the respondent no.2 DDA upon payment of 10% of the market value of amalgamated plot at the time of making the application and which comes to about ₹23 crores and of which a sum of ₹4 crores is already paid, it is entitled to permission for amalgamation. It is further contended that it is not as if the petitioner no.2 Company will by amalgamation get any additional FAR. It is else contended that amalgamation for construction of a single building is advantageous from all points of view.

11. The respondent no.2 DDA in its counter affidavit has reiterated the reasons for which the request for amalgamation has been rejected.

12. The senior counsels for the petitioners have relied upon *Clariant International Ltd. v. Securities & Exchange Board of India* (2004) 8 SCC 524 (para 26,28 & 29), on *Punjab National Bank v. Astamija Dash* (2008) 14 SCC 370 and on *Universal Petrochemicals Ltd. v. Rajasthan State Electricity Board* AIR 2001 Calcutta 102.

13. The finding of the Division Bench of this Court in the earlier round of litigation to the effect that there is no bar to amalgamation and on which ground the request was earlier rejected and the request for amalgamation can be considered is binding on this Bench. The next question however which arises is as to on what basis/principles the said discretion is to be exercised. The senior counsels for the petitioners contend that the request for amalgamation has to be considered as per the guidelines laid down in Resolution dated 7th January, 1991 (supra). They further contend that the Division Bench also has held the said guidelines to be applicable qua the plots in question.

14. Though no clear cut finding to this effect is found in the judgment dated 20th October, 2008 (supra) of the Division Bench but it nevertheless observed that the counsel for the respondent no.2 DDA had not seriously pursued the argument that the hotel plots are not commercial plots and therefore would not be governed by the said Resolution.

15. The Supreme Court however, is recently found to have been confronted with a similar issue in *ITC Ltd. v. State of Uttar Pradesh* (2011) 7 SCC 493 though in the context of Noida and not Delhi. The question for adjudication therein was, whether the plots earmarked for commercial purposes could be sold for the purposes of a hotel. The Supreme Court on examination of the various provisions as in force in Noida concluded that running a hotel is a commercial activity and use of a land or building for a hotel is a commercial use and allotment of plots for hotels in a commercial area was found to be in consonance with the Noida Regulations & Master Plan which earmarked areas for specific land use like industrial, residential, commercial, institutional, public, semi-public etc. The allotment of commercial plots for setting up hotels was thus held to be valid.

16. I have examined the provisions of the Delhi Development Act, 1957 and Delhi Master Plan for 2001 to see whether the position here is any different. Section 2(b) of the Act defines building as including any structure intended to be used for residential, industrial, commercial or other purposes. The Act does not define “commercial” and the classification elsewhere also is found to be confined between residential, industrial, commercial and other purposes only. Mention in this regard may be made of the Delhi Development Master Plan & Zonal Development Plan Rules, 1959 which also provide for the land use plan to provide for utilization of land as government, commercial, industrial, residential, cultural, educational, recreational, transportation and other activities only. Similarly DDA (Disposal of Developed Nazul Land) Rules, 1981 also provide for allotment of Nazul Land for public utilities, community facilities, open spaces, parks, playgrounds, residential purposes, industrial and commercial uses only. The mode of allotment prescribed is also for residential, industrial, commercial and public institutions, cooperative societies purpose only and for no other purpose. Thus, “other purposes” mentioned in Section 2 (b) supra translates under the Rules to public institutions, cooperative societies, in which Hotels

cannot fall. The Supreme Court in judgment (supra) has already held that hotel does not fall in industrial purpose. It has not been argued by the respondent no.2 DDA nor can it fall in residential purpose or in the public institution purpose which are required to be societies/trustees. On this parity of reasoning also, as found by the Apex Court in relation to Noida, in Delhi also there is no category other than commercial in which the plots meant for hotel purpose can fall. An examination of the Master Plan also shows hotels to be falling in commercial category only.

17. Once it is found that the hotels are part of the commercial classification of the respondent no.2 DDA, and the respondent no.2 DDA otherwise being unable to show that the Resolution dated 7th January, 1991 was not intended to apply to hotels, there is no reason to hold the said Resolution not applicable to the plots in question and to be dealt thereunder.

18. The respondent no.2 DDA has neither dealt with the request of the petitioners for amalgamation of the two plots, both in its name, in accordance with the said guidelines nor given any reasons therefor. The respondent no.2 DDA even though in the capacity of a seller of land, is in

such matters required to act reasonably and in accordance with law and any arbitrary action on its part would become subject to judicial review. Reference in this regard can be made to ***R.K. Mittal Vs. State of Uttar Pradesh*** MANU/SC/1471/2011 laying down that Development Authority, as the respondent DDA is, cannot act in a arbitrary and discriminatory manner.

19. Of the reasons given by respondent No.1, in order dated 10.11.2008 (supra) for rejection of request for amalgamation, i) the reason of the same amounting to change of auction conditions has already been negated by the Division Bench in earlier round of litigation; ii) the reason that amalgamation will totally change the type of Hotel that can be constructed and if the plots had been auctioned as one, would have invited better bids from International Hoteliers is also contrary to the findings of the Division Bench in the earlier round of litigation that the single plot was bifurcated for commercial gains of DDA and even otherwise irrelevant once the resolution supra is held to apply to Hotel Plots also – it may be noticed that the said reasoning equally applies to plots for office buildings / shopping malls in as much as the class of builders / developers thereof are also different for

smaller and larger plots – it may also be mentioned that though the proposal leading to resolution supra was for linking the charges for amalgamation to the premium paid for amalgamated plot, what was approved / resolved was to link the same to market rate on the date of application for amalgamation – if it is the case of DDA that the premium / market price for bigger plot would have been / be more, it will proportionately earn higher charges for amalgamation; iii) the reason that hotel plots have different architectural control than office buildings / shopping malls is irrelevant once hotel plots are included as aforesaid in commercial category – it is also worth mentioning that though the proposal leading to resolution supra required the application for amalgamation to be referred first to Architectural Control and Building Department but the resolution did not accept the same and expressly stated that the same was not necessary – DDA neither in the impugned order nor now has explained as to how amalgamation would contravene any other norms. Thus, the impugned order rejecting request for amalgamation is found to be in contravention of the resolution / decision of DDA itself and thus arbitrary and whimsical and does not pass the test of

legal scrutiny. Significantly, it is not a case of the respondent no.2 DDA that amalgamation is contrary to the Master Plan or the Zonal Plan.

20. For all the aforesaid reasons, the petition is entitled to succeed and is allowed. Mandamus is issued to the respondents to within 10 weeks hereof grant permission to the petitioners for amalgamation in accordance with the Resolution dated 7th January, 1991. To avoid any further dispute, it is further directed that in the peculiar facts of the case the petitioner shall not be entitled to any interest on the amount of ₹4 crores already deposited and the petitioners shall deposit the balance amount towards amalgamation charges in accordance with the Resolution dated 7th January, 1991 (supra) within the time demanded by the respondents. It is further directed that the time allowed for construction shall stand extended by the period for which the matter remained pending in the Courts.

No order as to costs.

RAJIV SAHAI ENDLAW, J

FEBRUARY 02, 2012

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